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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE EASTERN DISTRICT OF WASHINGTON**
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10 PATRICK FLEETWOOD ET AL,

NO. 2:20-CV-00355-SAB

11 Plaintiffs,

PLAINTIFFS' MOTION TO
REMAND REPLY BRIEF

12 v.
13 WASHINGTON STATE
14 UNIVERSITY,

11/25/2020 6:30 PM

15 Defendant.

WITHOUT ORAL
ARGUMENT

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18 Despite Defendant's attempt to factually distinguish *Lapides* the legal
19 principal announced in that case remains the same *a la* "the general legal principle
20 requiring waiver ought to apply" unless "there is something special about removal."
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22 *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 620 (2002)(citing
23 *Wisconsin Dep.t of Corr. v. Schacht*). *Lapides* found there was nothing inherently
24 "special" about that case's removal -- a removal involving both state tort law claims
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as well as a § 1983 claim. *Id.* at 621. By analogy, there is nothing inherently “special” about the removal of this case. Plaintiffs do not dispute Defendant’s ability to remove the case to this Court but only Defendant’s desire to maintain its 11th Amendment Immunity to Plaintiff’s claims. And while *Lapides* noted that a §1983 claim may not exist against a State because a State is not a “person” under §1983 it nevertheless held “that removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum.” *Lapides*, 535 U.S. at 624. Accordingly, in the event the Court does not remand the case to state court the Court should, at a minimum, rule that Defendant waived its immunity defense to all of Plaintiff’s claims except the § 1983 due process claim. (ECF No. 1-2, p. 72, *citing* count 7, § 1983 Due Process)

As it relates Plaintiff’s motion to remand the Administrative Procedures Act (APA) claim to state court, Defendant argues that remand is improper under *Younger* because the APA claim is “not ongoing because it was removed to federal court.” (ECF No. 9, pg. 8). Defendant cites *IndyMac Venture, LLC v. Silver Creek Crossing, LLC* 2009 WL 3698513 (W.D. Wn. 2009), *Village of Depue, Ill. v. Exxon Mobil Corp.*, 537 F.3d 775 (7th Cir. 2008), *Benas v. Shea Mortg. Inc.*, 2011 WL 4635645 * 2 (S.D. Cal. 2011), *Nielson v. Armstrong Consultants Inc.*, 2011 WL 13228456 * 7 (D. Ariz. 2011) and *Greenwood Park v. Park County*, 2008 WL

11414601 * 1 (D. Montana 2008) in support of the argument that *Younger* does not
1 apply because the APA claim is not ongoing. (ECF No. 9, pg. 8-9) Those cases from
2 2008, 2009, and 2011 do not control because they were decided *before* the Ninth
3 Circuit’s 2017 *Nationwide Biweekly Admin., Inc. v. Owen* decision which held, for
4 the purpose of *Younger*, that “[s]tate proceedings are ‘ongoing’ if they are initiated
5 ‘before any proceedings of substance on the merits have taken place in the federal
6 court’” - - - which is what happened here. *Nationwide Biweekly Admin., Inc. v.*
7 *Owen*, 873 F.3d 716, 728 (9th Cir. 2017)(citing *Hicks v. Miranda*, 422 U.S. 332,
8 349 (1975)).

12 Plaintiffs “initiated” the APA claim on March 13, 2020. (ECF No. 5, PGID
13 103) Plaintiff served Defendant with discovery on April 8, 2020. (ECF No. 5,
14 PGID 188) The state court denied Defendant’s motion to dismiss the APA claim
15 on May 7, 2020. (ECF No. 5, PGID 190) The state court issued an “Administrative
16 Scheduling Order” regarding the APA claim on May 12, 2020. (ECF No. 5, PGID
17 192 – 193) Defendant filed a motion to seal certain records relating to the APA
18 claim on June 10, 2020. (ECF No. 5, PGID 195) The Court granted Defendant’s
19 motion to seal on June 24, 2020. (ECF No. 5, PGID 201 - 204) Defendant filed the
20 “Agency Record” in the state court on June 30, 2020. (ECF No. 5, PGID 207 – 208)
21 From July 30, 2020 through October 7, 2020 the parties complied with the
22 Administrative Scheduling Order by filing an opening brief, a response brief, and a
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24
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1 reply brief. (ECF No. 5, PGID 544 – 577, 708 – 730, 769 - 788 *citing* 7/30/2020
2 Fleetwood’s Opening Brief; 9/21/2020 Defendant’s Response Brief; 10/7/2020
3 Fleetwood’s Reply Brief) Unquestionably, Plaintiff “initiated” and then prosecuted
4 the APA claim months before Defendant removed that claim to this court. By way
5 of comparison, no proceedings of any substance have occurred in this Court.
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7 Accordingly, since the APA claim was “ongoing” before its removal to this
8 Court and since this Court has not conducted anything of substance on the merits
9 of any of Plaintiff’s claims the Court should remand the APA claim to the Whitman
10 County Superior Court.
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12 Plaintiff’s motion should be granted.
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14 DATED this November 23, 2020.
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties, if any, shall be served in accordance with the Federal Rules of Civil Procedure.

Dated this November 23, 2020

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